UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

H. G. SECURITY SYSTEM, INC.
Employer[1]

and Case No. 29-RC-9404

ALLIED INTERNATIONAL UNION
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before James Kearns, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record indicates that H.G. Security System, Inc., herein called the Employer, is a New York corporation with its principal office and place of business at 247-05 Jamaica Avenue, Bellerose, New York, and is engaged in providing security

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1 The Employer's name appears as amended at the hearing.

2 The undersigned Regional Director hereby amends the transcript sua sponte as indicated in the Appendix attached hereto. References to transcript page numbers are herein abbreviated as "Tr. #".

services. The parties stipulated that, during the past 12 months, the Employer, in the course and conduct of its business operations, provided security services valued in excess of $50,000 to the United States government, an entity directly engaged in interstate commerce.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein[3] claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Allied International Union, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time security officers, including lieutenants and captains, employed by the Employer at the U.S. Immigration and Naturalization Service ("INS") building located at 201 Varick Street, New York, New York, but excluding all other employees and supervisors as defined in the Act.[4]

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[3] At the hearing, the parties stipulated that the Petitioner (which seeks to represent a unit of security guards) is a labor organization within the meaning of Section 2(5) of the Act. However, the Employer tried to raise an issue of whether the Petitioner is certifiable under Section 9(b)(3) of the Act to represent a unit of guards. The Petitioner's secretary-treasurer, Joseph Glennan, testified that Petitioner has approximately 4,000 members, all of whom are security guards. Glennan testified that the Petitioner does not admit non-guards to membership, and is not affiliated with the AFL-CIO. The Employer produced no evidence whatsoever that the Petitioner admits non-guards to membership, or is affiliated with any organization admitting non-guards to membership. I hereby find that the Petitioner is a certifiable guard union under Section 9(b)(3) of the Act. Administrative notice is also taken that this Petitioner has been found certifiable in previous cases, such as BII, Inc., d/b/a IBI Security Services, Case No. 29-RC-8393.

[4] The petition, as initially filed, sought a unit of all the Employer's "security officers, including sergeants and lieutenants," without specifying the work site. At the beginning of the hearing, the petition

The Employer asserts that the captain and lieutenants are supervisors as defined in Section 2(11) of the Act, and therefore must be excluded from the unit. The Employer's president and owner, Hector Gonzalez Sanchez (herein called Gonzalez), testified in support of its position on this issue. The Petitioner denies that the captain and lieutenants are supervisors. Neither party called any employees in the disputed classifications to testify.

The Employer, whose main office is located in Bellerose, New York, has contracted with the INS to provide security at the Varick Street facility. The INS facility processes detainees for deportation to their country of origin. The facility contains courtrooms for the deportation proceedings, an infirmary, a gym for detainees and other areas.

The Employer employs a total of 27 people in the petitioned-for unit, including one captain, three lieutenants and 23 regular security officers (three of whom are designated as "alternate" lieutenants/supervisors for when the lieutenants are unavailable). These guards provide security for the INS facility 24 hours per day, 7 days per week. The guards work in different shifts, which were not specified in the record. Their duties include checking visitors into the facility, operating a metal detector, guarding detainees

in any area of the building (including the visiting area, courtrooms, infirmary and gym) and accompanying detainees when they have to leave the facility (e.g., to go to a hospital). While the courts are in session on weekdays, the Employer schedules

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was amended to specify the Varick Street location. Later during the course of the hearing, it was also revealed that the Employer does not employ any "sergeants" at the Varick Street facility, but that it employs a "captain" there. Although the Petitioner did not amend the petition further by substituting

approximately 11 or 12 guards to work at the INS building. On nights, weekends and holidays, the Employer schedules approximately 4 to 6 guards to work there.

The Employer also employs a contract manager, Wilbert Brennan,[5] at the INS facility. Gonzalez testified that Brennan manages the day-to-day operations there, and acts as the Employer's liaison to the INS. Because space is extremely limited, the Employer does not have an office at the INS building. Brennan works primarily in the visitor check-in area on the fourth floor, near the metal detectors, where there is a desk.

According to Gonzalez, the INS contract explicitly requires the Employer to have one "supervisor"[6] on site at all times. The "supervisor" must work only as a supervisor during that shift, and must not perform regular security-officer duties (such as relieving security officers during their breaks).

The captain assigned to the INS building is Wayne Knight. He usually works from 8:00 AM to 4:00 PM, Mondays through Fridays, although his schedule may vary. While Knight is on duty, there are no lieutenant "supervisors" on duty. Gonzalez testified that both Knight (captain) and Brennan (contract manager) prepare the guards' schedules. Knight's duties also include making sure that the guards arrive to work on time, in uniform and fit for duty. He decides where each guard should work during the shift, and monitors their performance. Knight works from the fourth-floor security check-in area, but he has a two-way radio so he can be contacted while monitoring guards in other areas of the facility (e.g., the courtrooms).

"captains" for "sergeants," it is obvious that Petitioner seeks to include the captain as well. As discussed in more detail below, the parties dispute whether the captain and lieutenants are statutory supervisors.

5 There appears to be no dispute that the contract manager is excluded from the bargaining unit.

For each shift when Knight is not on duty, there is one lieutenant "supervisor" on duty. The lieutenants normally work on nights and weekends, when the courts are not in session, with a smaller crew of guards. The lieutenants make sure that the guards arrive for work on time and in uniform. Lieutenants also assign guards to work in various locations (i.e., the infirmary, gym and visiting areas), and monitor whether the guards perform their duties properly. Like the captain, lieutenants carry a radio, and move from location to location within the facility.

Three guards have been designated as "alternate supervisors," to fill in for lieutenants as needed. They work primarily as security officers, but may act as "supervisors" when a lieutenant is on vacation or out sick. Gonzalez testified that since the INS normally forbids regular security officers from acting as supervisors, the Employer had to obtain a waiver from INS to allow these alternates to do so. Gonzalez did not estimate how often the alternates serve as lieutenants, but he noted that none had done so since October 1999 (in the three months preceding the hearing herein).

Whenever a detainee needs to leave the facility to go to a hospital, the INS notifies the captain or lieutenant on duty. Gonzalez testified that this usually happens on nights or weekends, when neither captain Knight nor manager Brennan is present at the facility. As a result, it is usually a lieutenant who must initiate the response. Under the INS contract, the Employer must respond within three hours. The lieutenant must contact Brennan and Gonzalez, even if it is the middle of the night. Gonzalez initially testified that the lieutenant must decide which two security officers to send to the

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6 Someone who is responsible for overseeing employees as a "supervisor" for INS security purposes is not necessarily a "supervisor" for labor-relations purposes. Thus, use of the word "supervisor" in this context does not mean that the person is a supervisor as defined in the National Labor Relations Act.

hospital, based on who is available. However, Gonzalez later testified somewhat vaguely that there are "people" the Employer can call under a "schedule" for hospital calls, and that "we activate the system" once notified by the INS. Thus, it is not entirely clear whether the lieutenants decide independently whom to assign, or whether they simply notify guards whom the Employer has previously designated as available for hospital calls.

Accompanying detainees to a hospital usually entails overtime work for the security officers. Gonzalez explained that although he normally has "zero tolerance" for overtime, in this particular contract, overtime is "a way of life." Thus, Gonzalez has generally authorized overtime work for hospital calls. Gonzalez also stated that he delegated the authorization of overtime to the manager and "supervisors," but they have to let the office know about it.

"Supervisors" can report employee misconduct or other problems to Gonzalez at the Employer's office in Bellerose. Gonzalez testified generally that "supervisors" may fill out an incident report recommending discipline or discharge, and send the form to manager Brennan, who then sends it to the Bellerose office for consideration. (No examples of these disciplinary forms were introduced into evidence.) Gonzalez then reads the form, takes statements from both the "supervisor" and employee involved, and decides whether to take any action. Gonzalez did not give any specific examples of a particular "supervisor" recommending discipline or discharge. Although he initially stated that captain Knight was "involved" in a decision to terminate an employee (Tr. 37-8), he did not explain the specific circumstances. Gonzalez later testified that an employee with attendance problems (e.g., constantly calling in sick) was discharged

based on the recommendation of a "supervisor," but he could not remember whether it was Knight or one of the lieutenants (Tr. 44-5). In that instance, Gonzalez sent a letter inviting the employee to submit a doctor's note and to come to the Bellerose office to explain why he should not be terminated. The employee then met with Gonzalez at the office. However, after the employee continued to abuse sick leave, Gonzalez sent him a termination letter. Gonzalez also testified somewhat vaguely about deciding to suspend an employee for chronic lateness (Tr. 49). In response to a leading question -- whether he learned of the employee's lateness from a supervisor -- Gonzalez responded affirmatively. However, he did not identify the supervisor or provide any other details. Finally, Gonzalez testified that he was "pretty sure" the lieutenants have recommended disciplinary action, but did not provide any specific information (Tr. 57). It is undisputed that lieutenants do not have independent authority to discipline or discharge employees.

Gonzalez testified that captain Knight has recommended the hiring of new employees. When the Employer needed new employees, it advertised in a local newspaper and obtained "word of mouth" recommendations from "supervisors" and others. Applicants then went to the Bellerose office[7] to fill out application forms and be interviewed there by Gonzalez and the Employer's other "officers." Candidates also had to go through an extensive screening process, including a physical examination, a drug test, fingerprinting and a 90-day background investigation by the U.S. Department of

[7] Gonzalez explained that candidates must be interviewed at the Employer's Bellerose office. Security clearance issues prevent candidates from being interviewed at the INS facility itself.

Justice. Gonzalez stated that he ultimately decides which candidates to hire, and that he indeed hired the candidates recommended by Knight.

In order to request time off, employees must submit a written request form. Gonzalez testified that the form contains a space for the "supervisor" to recommend approval or disapproval, although no copies of the forms were admitted into evidence. The form then goes through the "chain of command" to the Bellerose office for final approval.

The captain, lieutenants and security officers are paid on an hourly basis. They record their hours by signing a logbook. Under the Employer's contract with the federal government, the Employer must pay certain specified wages and benefits. Lieutenants earn $1 per hour more than other security officers, and received a bonus last year. (Security officers who work as alternate lieutenants also earn $1 when they do so.) Captain Knight earns $2 per hour more than the security officers.

All of these guards, including the lieutenants and captain, wear the same uniform. However, the lieutenants and captain wear a metal bar showing their higher rank. Security officers who work as alternate "supervisors" wear the lieutenants' bar when they do so.

Discussion

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Company, Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the

Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. Tuscan Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not merely "routine" in nature.

In the instant case, the Employer has not met its burden of proving that the lieutenants and captain are supervisors as defined in the Act. At most, they possess some low-level authority to assign and oversee employees, but without using independent judgment and without exercising any real supervisory authority over their employment status.

The record indicates that the lieutenants and captain may "assign" employees, by deciding which employee should guard each location within the INS facility during the shift, and possibly which guards should be sent to a hospital outside the facility. However, it appears that such assignments are routine in nature, simply based, as Gonzalez testified, on the "human resources available." There is no record evidence that such assignments require the use of non-routine, independent judgment sufficient to satisfy the Act's definition of supervisor. Similarly, the captain and lieutenants' ability to authorize overtime for employees accompanying a detainee to a hospital does not require independent judgment, since Gonzalez has essentially pre-authorized the overtime in

those circumstances. At most, the captain and lieutenants simply carry out a pre-established "system" for responding to hospital calls.

The record further shows that the captain and lieutenants have no authority to make employment-related decisions independent of the Employer's Bellerose office. Although Gonzalez claimed that "supervisors" must recommend approval or disapproval of employees' requests for time off, the requests must be approved by the Bellerose office. Similarly, although the captain and other people recommended some candidates for hire through "word of mouth," the Employer clearly conducted its own extensive screening process (including interviews at the Bellerose office, a physical exam, drug test, etc.) before Gonzalez decided whom to hire. This evidence falls far short of establishing that the captain *effectively* recommends the hiring of employees, i.e., that the Employer regularly or automatically accepts his recommendations without independent review.

Gonzalez generally testified that the captain and lieutenants have authority to recommend discipline and discharge of employees, although he could not recall a single specific example in detail. Gonzalez could not remember who recommended discharging the employee with excessive absences, and was only "pretty sure" that lieutenants had recommended discipline. These kinds of conclusionary statements, without specific and competent evidence to support them, are insufficient to establish supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991). In any event, even assuming *arguendo* that the captain and/or lieutenants have actually recommended discipline or discharge, the evidence clearly shows that the Bellerose office conducts its own investigation before deciding whether to impose discipline. The record contains no specific evidence that the

captain and lieutenants' recommendations are regularly or automatically accepted, without the Employer's independent review.

Furthermore, the record contains no evidence that the captain and lieutenants have authority to transfer, reward, promote, lay off or recall employees, or to adjust their grievances. Absent such "primary" statutory criteria, evidence of any "secondary" indicia (e.g., higher wages, differences in uniform bars) is insufficient to support a finding of supervisory status. Bay Area-Los Angeles Express, Inc., 275 NLRB 1063, 1080 (1985); Memphis Furniture Mfg. Co., 232 NLRB 1018, 1020 (1977). Finally, it should be noted that contract manager Brennan's day-to-day presence at the INS facility negates any argument that the facility would be unsupervised if the captain and lieutenants are found not to be statutory supervisors.

Based on the foregoing, I find that the Employer has not met its burden under Tuscan Gas, supra, of proving that the captain and lieutenants are supervisors as defined in Section 2(11) of the Act. Accordingly, I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time security officers, including lieutenants and captains, employed by the Employer at the Immigration and Naturalization Service building at 201 Varick Street, New York, NY, but excluding all other employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending

immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the Allied International Union.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before February 10, 2000. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances.

Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by February 17, 2000.

Dated at Brooklyn, New York, this 3rd day of February, 2000.

/S/ ALVIN BLYER

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

177-8560-1500, 177-8560-4000,
177-8560-8000, 177-8560-9000

APPENDIX

The transcript is hereby amended as follows:

Page 7, line 24: "principal" rather than "principle".

Page 7, line 25 et seq.: All references to the "Belrose" facility should be spelled "Bellerose".

Page 8, line 8: "Varick" Street, rather than "Barracks" Street.

Page 10, line 8: Section "2(5)" rather than "25".

Page 12, line 23 et seq.: All references to Section "211" of the Act should be punctuated as Section "2(11)".

Page 26, line 4: "Westlaw" rather than "Lesslaw".